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Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Health Care?

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COMMENTS

STATUTORY CAPS: AN INVOLUNTARY CONTRIBUTION TO THE MEDICAL MALPRACTICE INSURANCE CRISIS OR A REASONABLE MECHANISM FOR OBTAINING AFFORDABLE HEALTH CARE?

A medical malpractice insurance crisis occurred in the mid-1970s and mid-1980s evidenced by escalating malpractice insurance rates and increasing numbers of malpractice claims.[1] Insurance companies maintained that the increase in insurance rates was necessary because of the sharp rise in the number of malpractice lawsuits, astronomical damage awards, and ineffective mechanisms to prevent and to eliminate nonmeritorious claims.[2] Physicians responded by forming their own insurance companies,[3] cancelling high-risk procedures,[4] and orchestrating intensive legislative lobbying for tort reform.[5] Insurance companies, physicians, and the legislature collaborated efforts to resolve this medical malpractice crisis.

A national debate erupted regarding the proper way to address the medi-

1. David Holthaus, *After Tort Reform: What's Next?*, 62 HOSPITALS, Sept. 20, 1988, at 48; Jane C. Arancibia, Note, *Statutory Caps on Damage Awards in Medical Malpractice Cases*, 13 OKLA. CITY U. L. REV. 135, 137-39 (1988). "Hospital insurance premiums rose from $61 million in 1960 to $1.2 billion in 1976." *Id. See also* Daryl L. Jones, Note, Fein v. Permanente Medical Group: *The Supreme Court Uncaps the Constitutionality of Statutory Limitations on Medical Malpractice Recoveries*, 40 U. MIAMI L. REV. 1075, 1078 (1986) (explaining that physicians, the insurance industry, and legislators referred to the phenomenon of increases in malpractice claims as a "medical malpractice crisis"). The frequency of tort claims filed per one hundred doctors rose from about one claim per one hundred doctors in 1960 to an estimated high of seventeen claims per one hundred doctors in the mid-1980s before leveling off at thirteen claims per one hundred doctors at the end of the 1980s. PAUL C. WEBER, MEDICAL MALPRACTICE ON TRIAL 94 (1991).

2. Joan Beck, *An Ugly Fight: ABA vs. AMA*, CHI. TRIB., Feb. 17, 1986, § 1, at 10; Susan Okie, *GAO Targets Insurance Costs: Medical Malpractice Policies Soar to $4.7 Billion*, WASH. POST, June 6, 1987, at A13; *see also* Jones, *supra* note 1, at 1078-79 (stating that "insurers asserted that providing malpractice insurance was both risky and unprofitable"). *See* Martin J. Hatlie, *Professional Liability*, 261 JAMA 2881 (1989)(stating that the frequency of medical malpractice claims escalated dramatically in the mid-1980s).

3. Beck, *supra* note 2, at 10.

4. Laurie Goring, *Bill Urges Malpractice Award Cap*, CHI. TRIB., Apr. 10, 1987, § 2, at 6.

5. Jones, *supra* note 1, at 1079.

cal malpractice insurance crisis.[6] Insurance companies and physicians pressured state legislatures to reform liability laws that, in their opinion, permitted recovery of excessive damage awards by plaintiffs.[7] Consumer groups and lawyers suggested tighter regulation of the insurance industry.[8] State legislatures, in an attempt to remedy the perception that injured plaintiffs were overcompensated for their injuries, enacted "tort reform legislation," which included statutory caps on damages recoverable in medical malpractice actions.[9] As a result of the extensive lobbying effort by physicians and insurance companies, twenty-seven states enacted statutes limiting recovery of damages in medical malpractice lawsuits.[10] Lawyers responded by challenging state malpractice legislation on constitutional grounds,[11] alleging violations of federal and state equal protection and due process

6. Michael J. Abramowitz, *W.Va. Court Halts Insurers' Cancellations*, WASH. POST, May 10, 1986, at D1.

7. *Id.*; *see also* Goring, *supra* note 4, at 6 (noting that jury verdicts in malpractice actions vary even for similar injuries sustained).

8. Abramowitz, *supra* note 6, at D1.

9. Holthaus, *supra* note 1, at 48. The feeling that the insurance crisis was widespread was reflected in the United States General Accounting Office Report entitled *Medical Malpractice: A Framework For Action*. This extensive report suggested reforms on the legal level. Tort reforms included statutory caps, abolishment of joint and several liability, elimination of the collateral source rule, and periodic judgment payments. The report also suggested reforms on the medical level such as review panels and better disciplinary and investigative techniques by the American Medical Association. U.S. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: A FRAMEWORK FOR ACTION (1987). *See also* Okie, *supra* note 2, at A13 (noting that malpractice insurance costs rose from $2.5 billion in 1983 to $4.7 billion in 1985).

10. ALA. CODE § 6-5-544 (Supp. 1991); ALASKA STAT. § 09.17.010(a) and (b) (1991); CAL. CIV. CODE § 3333.2 (West Supp. 1992); COLO. REV. STAT. § 13-21-102.5 (1987 & Supp. 1991); Tort Reform and Insurance Act of 1986, ch. 86-160, 1986 Fla. Laws 160 (repealed 1991); Act of June 1, 1981, ch. 162, 1975 Idaho Sess. Laws 1-13 (repealed 1981); Act effective Nov. 11, 1975, ch. 79-960, § 4, 1975 Ill. Laws 960 (repealed 1979); IND. CODE ANN. § 16-9.5-2-2 (Burns 1990 & Supp. 1992); KAN. STAT. ANN. § 60-3402 (Supp. 1991); LA. REV. STAT. ANN. § 40:1299.39 (West 1992); MD. CTS. & JUD. PROC. CODE ANN. § 11-108 (1989 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 231, § 60H (West Supp. 1992); MICH. COMP. LAWS ANN. § 600.1483 (West Supp. 1992); Act effective May 4, 1990, ch. 455, 1986 Minn. Laws 88 (repealed 1990); Act effective 1983, ch. 189, 1983 Mont. Laws 675 (repealed 1983); NEB. REV. STAT. § 44-2825 (1988); N.H. REV. STAT. ANN. §§ 507-C: 7, 508: 4-d (1983 & Supp. 1991); N.M. STAT. ANN. § 41-5-6 (Michie 1989 & Supp. 1992); N.D. CENT. CODE. § 26.1-14-11 (1989 & Supp. 1991); OHIO REV. CODE ANN. § 2307.43 (Anderson 1991); S.D. CODIFIED LAWS ANN. § 21-3-11 (1987 & Supp. 1992); TEX. REV. CIV. STAT. ANN. art. 4590(i) §§ 11.01-11.05 (West Supp. 1992); UTAH CODE ANN. § 78-14-7.1 (1992); VA. CODE ANN. § 8.01-581.15 (Michie 1984), *as amended by* VA. CODE ANN. § 8.01-38.1 (Michie Supp. 1992); WASH. REV. CODE ANN. § 4.56.250 (West 1988 & Supp. 1992); W. VA. CODE § 55-7B-8 (Supp. 1992); WIS. STAT. ANN. § 655.27 (West 1980 & Supp. 1991). The District of Columbia City Council is currently deciding whether to enact a statutory cap on noneconomic damages in medical malpractice actions. Molly Sinclair, *Battle Lines Form in Malpractice Debate*, WASH. POST, Feb. 6, 1992, at B4.

11. Beck, *supra* note 2, at 10.

clauses and the Seventh Amendment right to a jury trial.[12] Opponents of the cap also asserted violations of state constitution provisions such as the "open courts" provision or the "special legislation" clause.[13] To date, ten state courts have held that statutory caps are unconstitutional.[14] Statutory caps and other tort reform measures are extremely important in light of proposed health care legislation entitled the Health Care Liability Reform and Quality of Care Improvement Act of 1992 [the "Health Care Bill"].[15]

This Comment critically examines the constitutionality of statutory caps on damages in medical malpractice actions. It focuses on the public policy behind the caps and the constitutional issues embodied in limiting an individual's recovery. It also analyzes the impact of the Health Care Bill on statutory caps. Part I outlines the medical malpractice insurance crisis, describes the statutory reforms and discusses the public policy behind tort reform. Part II examines the constitutionality of statutory caps and

12. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1991); Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976), *cert.denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); Williams v. Kushner, 549 So. 2d 294 (La. 1989); White v. State, 661 P.2d 1272 (Mont. 1983); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

13. Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986); Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149 (La. 1985); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).

14. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 171 (Ala. 1991) (cap violates right to a jury trial and equal protection clause of the state constitution); Smith v. Department of Ins., 507 So. 2d 1080, 1089 (Fla. 1987) (cap violates state "open courts" provision); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 744 (Ill. 1976) (cap violates "special legislation" clause and equal protection clause of state constitution); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 260, 264 (Kan. 1988) (cap violates right to a jury trial and "open courts" provision of state constitution); White v. State, 661 P.2d 1272, 1275 (Mont. 1983) (cap violates equal protection guarantees), *rev'd on other grounds*, Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989); Carson v. Maurer, 424 A.2d 825, 838 (N.H. 1980) (cap violates equal protection clause of the state and federal constitution); Arneson v. Olson, 270 N.W.2d 125, 135 (N.D. 1978) (cap violates equal protection clause of state constitution); Morris v. Savoy, 576 N.E.2d 765, 7771 (Ohio 1991) (cap violates due process clause of the state constitution); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (cap violates "open courts" provision of state constitution); Sofie v. Fireboard Corp., 771 P.2d 711, 723 (Wash. 1989) (cap violates state constitutional right to a jury trial).

15. H.R. 3037, 102d Cong., 1st Sess. (1991). On May 15, 1991 President Bush recommended enactment of the Health Care Liability Reform and Quality of Care Improvement Act of 1991. H.R. Doc. No. 84, 102d Cong., 1st Sess. (1991). On July 2, 1992, President Bush submitted the Health Care Liability Reform and Quality of Care Improvement Act of 1992. 138 Cong. Rec. S9772-02 (daily ed. July 2, 1992); 138 Cong. Rec. H5976-07 (daily ed. July 2, 1992). The 1992 bill contains the core provisions of the 1991 bill. *Id.* The 1992 bill also recommends that treatment under federally funded health care programs and federal employee benefit programs be reformed irrespective of state tort reform initiatives. *Id.*

summarizes the arguments of the proponents and the opponents of these caps. Part III discusses the Health Care Bill and its impact on medical malpractice legislation with respect to statutory caps. This Comment concludes that a compromise must be reached that addresses both the growing health care insurance crisis and the protection of individual rights. The Health Care Liability Reform and Quality of Care Improvement Act of 1992 attempts to achieve this compromise.

I. THE MALPRACTICE INSURANCE CRISIS AND LEGISLATIVE TORT REFORMS

The medical malpractice crisis of the 1970s and 1980s can be attributed to a combination of factors. During the early 1970s, and again in the 1980s, medical malpractice claims increased, damage awards escalated, and amounts paid under insurance policies rose.[16] Insurance companies argued that the rising number of frivolous claims, coupled with high and erratic jury verdicts, decreased the predictability of the rate structure, forcing the insurance companies to raise premiums.[17] Critics of the insurance industry suggested that these increases in malpractice claims and damage awards were not reflected in insurance premiums in a timely fashion.[18] Initially, investment gains in the stock market obscured the inadequacy of premiums and rates.[19] When the stock market gains declined, the insurance companies' surplus suffered massive losses.[20] Consequently, the insurance companies' approach to medical malpractice insurance changed: premiums escalated and certain coverage was reduced or eliminated.[21] Many insurance companies went bankrupt.[22] As a result, the cost and availability of insurance na-

16. Arancibia, *supra* note 1, at 138; Jones, *supra* note 1, at 1078. The leading medical malpractice insurance companies reported a 55% increase in claims from 1980 to 1986. Arancibia, *supra* note 1, at 138. There was also a corresponding premium increase. *Id.*

17. Arancibia, *supra* note 1, at 137.

18. Williams v. Kushner, 549 So. 2d 294, 306 (La. 1989) (Dixon, C.J., dissenting); Wylie A. Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L.J. 90, 96 (1976). *See also* Barry A. Oster, *Medical Malpractice Insurance*, 45 INS. COUS. J. 228, 231 (1978); *see generally* Arancibia, *supra* note 1, at 137-38 (discussing malpractice insurance costs).

19. *Kushner*, 549 So. 2d at 306. *See generally* Arancibia, *supra* note 1, at 137-38 (discussing rise in malpractice insurance premiums); Aitken, *supra* note 18, at 96. Physicians assert that premiums were raised to compensate for paper losses in the insurance industry's capital and surplus portfolios as a result of a general investment market depression. Oster, *supra* note 18, at 231.

20. *Kushner*, 549 So. 2d at 306; Oster, *supra* note 18, at 231. *See generally* Aitken, *supra* note 18, at 96; Arancibia, *supra* note 1, at 137-38 (discussing the impact of malpractice claims on the insurance industry).

21. *Kushner*, 549 So. 2d at 306; Aitken, *supra* note 18, at 96.

22. *Kushner*, 549 So. 2d at 306.

tionwide was significantly impacted.[23] Some commentators suggested that other factors, including lack of patient trust, increase in public litigiousness, increase in medical error due to advanced technology, and lawyers' contingency fees contributed to the malpractice crisis.[24]

In response to the crisis, state legislatures passed the first set of tort reforms. Twenty-seven state legislatures enacted tort reform legislation which included statutory caps on economic and noneconomic damages.[25] These statutory caps were at the heart of the controversy over tort reform. Insurers and physicians blamed lawyers and juries for the medical malpractice insurance crisis.[26] The American Hospital Association (AHA) argued that the most immediate effect on the malpractice crisis would be a cap on noneconomic damage recoveries, particularly for pain and suffering.[27] The AHA contended that juries add to the crisis because they fail to consider the societal impact of large awards.[28] Physicians argued that the problem was that "[j]uries have no guidelines to measure noneconomic losses[;] . . . in two recent suits, in which people suffered slight but similar injuries, juries awarded one patient $97,000 in noneconomic damages and the other got $280,000."[29] Insurers and physicians claimed that the statutory cap would ensure consistency among jury verdicts[30] providing incentive for lawyers to settle and eliminating the possibility of a huge jury verdict and the corresponding large contingency fee.[31]

Legal commentators argued that statutory caps would inflict injustice on people with legitimate claims and those most severely injured.[32] Tort law essentially shifts the costs of injuries caused by negligence to the individual who breached a duty of due care.[33] Caps, therefore, would be contrary to the very essence of tort law because some plaintiffs would be virtually uncompensated for severe injuries.[34] Rather than adopting a straight inflexible statutory cap on damages, the judiciary should provide guidelines for juries in calculating damages.[35] Guidelines would offer the flexibility and equity

23. *Id.*
24. Arancibia, *supra* note 1, at 138.
25. *See supra* note 10 and accompanying text.
26. David Burda, *AHA Offers Solutions to Malpractice Crisis*, HOSPITALS, May 5, 1986, at 53.
27. *Id.*
28. *Id.*
29. Goring, *supra* note 4, at 6.
30. *See id.* (noting that caps will have an immediate effect on inconsistent jury awards).
31. Burda, *supra* note 26, at 53.
32. *Computing the Cost of Accidents*, CHI. TRIB., Apr. 3, 1986, § 1, at 22.
33. *Id.*
34. *Id.*
35. *Id.*

necessary to balance the individual's right to full compensation against the predictability in insurance rates and to ensure the availability of malpractice insurance.[36] The American Bar Association rejected the idea of statutory caps and urged that judges be more active in reducing excessive damage awards.[37] Legal commentators suggested other means of resolving the crisis:

> Medical malpractice must be decreased and incompetent physicians restrained or replaced; if the medical profession can't police itself better, states must do so, however undesirable that may be . . . . Changes must be made in the legal system so that a much larger share of awards goes to real malpractice victims and less is eaten up by legal costs, and so that there are effective disincentives for filing frivolous cases.[38]

To evaluate the effectiveness of statutory caps, two independent studies on tort reform were completed during the 1970s.[39] One study found that by 1978 statutory caps on damage awards materially decreased the rise in claim severity.[40] The other study concluded that tort reform legislation had little effect on curing the medical malpractice insurance crisis.[41] Tort reform in California, however, has been effective.[42] Following the enactment of tort reform in 1976, physicians' premiums were approximately 30% lower across the board in California than were the premiums of physicians in other states that had not placed caps on noneconomic damages.[43]

More and more commentators argue that tort reform is an obsolete cure for the medical malpractice crisis.[44] They suggest that legislatures must enact nontraditional and innovative measures to ensure a balance between the compensation of victims and the protection of the medical profession.[45]

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36. *Id.*

37. David G. Savage, *Bar Panel Rejects Idea of a Ceiling on Damage Awards*, L.A. TIMES, Jan. 12, 1987, at 4.

38. Beck, *supra* note 2, at 10.

39. Arancibia, *supra* note 1, at 139.

40. *Id.*

41. *Id.*

42. Hatlie, *supra* note 2, at 2882.

43. *Id.*

44. Holthaus, *supra* note 1, at 48; Peter D. Jacobson, *Medical Malpractice and the Tort System*, 262 JAMA 3320, 3326 (1989).

45. Holthaus, *supra* note 1, at 48. "Tort reform is after the fact . . . . The whole tort system is a kind of a mop-up operation." *Id.* at 53 (quoting Dr. Sidney Wolfe, director of Public Citizen Health Research Group). *See* Antoinette D. Paglia, Comment, *Taking the Tort Out of Court-Administrative Adjudication of Medical Liability Claims: Is it the Next Step?*, 20 SW. U. L. REV. 41, 42 (1991) (noting that previous tort reforms have failed to provide an adequate remedy). "Successful resolution will undoubtedly depend on the willingness of legislatures to explore and experiment with innovative methods of alternative dispute resolution." *Id.*

Suggestions include arbitration,[46] medical review panels,[47] agency adjudication of medical malpractice claims,[48] patient compensation funds[49] and accelerated compensation event systems.[50] Medical malpractice is not a single problem; it is a series of problems spanning the legal and medical professions as well as the insurance industry.[51] To resolve the problem, the medical profession and the insurance markets must be regulated and controlled; at the same time, the court must make a consistent assessment of tort liability.[52]

II. CONSTITUTIONALITY OF STATUTORY CAPS

A. Equal Protection[53]

A majority of courts invalidate statutory caps on medical malpractice damages as a violation of the equal protection clause of the state or the federal constitution.[54] Courts consistently utilize a two-tier approach in analyz-

46. Paglia, *supra* note 45, at 44. Arbitration is an effective means of reducing the time and cost involved with medical malpractice claims. *Id.* Notably, Senator Pete V. Domenici has introduced a proposal whereby plaintiffs would bring their medical malpractice claims to an arbitration panel. Sarah Glazer, *Whatever Happened to the Malpractice Insurance Crisis?*, WASH. POST, July 9, 1991, Health Section, at 11.

47. Paglia, *supra* note 45, at 43. Although screening panels are not a workable solution to the medical liability crisis, they are seen as a means of weeding out nonmeritorious claims. *Id.*

48. *Id.*

49. Abramowitz, *supra* note 6, at D1.

50. Accelerated compensation event system is a no fault system proving an exclusive remedy for many obstretrical injuries. Walter Wadlington, *Medical Injury Compensation A Time for Testing New Approaches*, 265 JAMA 2861 (1991). The malpractice victim need not prove fault in order to recover damages. *Id.* Certain "avoidable events" trigger payment. *Id.* Accordingly, this system would limit the number of recoveries. *Id.* Health Care providers and patients contract, in advance of injury, the accelerated compensation events. *Id.*; *see also* WEBER, *supra* note 1, at 94 (eliminating tort liability from contractual agreements between physicians and patients).

51. Jacobson, *supra* note 44, at 3320.

52. *Id.*

53. Equal protection of the law guarantees that a reasonable basis exists for a distinction in treatment between those individuals within a class and those individuals that fall outside of a class. Morris v. Savoy, 576 N.E.2d 765, 771 (Ohio 1991). Legislation should apply equally to all individuals within a class. *Id.*

54. *Id.*; Williams v. Kushner, 549 So. 2d 294 (La. 1989); *accord* Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986); Fein v. Permanente Medical Group, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985) (Mosk & Bird, J.J., dissenting); Jones v. State Bd. of Medicine, 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149 (La. 1985) (Blanche, J., dissenting); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976); Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Duren v. Suburban Community Hosp., 482 N.E.2d 1358 (Ohio C.P. 1985).

ing equal protection challenges.[55] The first tier of the equal protection analysis is the determination of the appropriate standard of judicial review.[56] The second tier is the application of the standard of judicial review to the classification in question using a means-ends analysis.[57] In declaring statutory caps unconstitutional, most courts apply either strict scrutiny or the intermediate level of review.[58] In upholding statutory caps, courts consistently apply the lowest level of judicial review, the rational basis test.[59]

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55. *Sibley*, 462 So. 2d at 155; Lucas v. United States, 757 S.W.2d 687, 695 (Tex. 1988). *See* cases cited *supra* note 54.

56. The United States Supreme Court has established three primary levels of judicial review: Strict scrutiny applicable to legislation involving a suspect class or an infringement on a fundamental right; intermediate level of review applicable to legislation involving gender classifications; and rational basis review, the lowest and most common level of judicial review. JOHN E. NOWACK ET AL., CONSTITUTIONAL LAW 533-37 (3d ed. 1986). In determining the appropriate standard of judicial review, judicial inquiry focuses on the existence of a fundamental right or suspect classification. *Id.* at 534 n.54. If the classification involves neither a fundamental right nor a suspect classification, the court will apply a lowest level of judicial review, the rational basis test. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-40 (1985); Schweiker v. Wilson, 450 U.S. 221, 230 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); *see also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 572 (1979) (holding that because no suspect class was involved the classification was rationally related to legislative purpose); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (applying strict scrutiny to legislation impacting a fundamental right). If a court recognizes a fundamental right, or a suspect classification, it will apply the heightened level of review known as strict scrutiny. *See, e.g., City of Cleburne*, 473 U.S. at 440 (laws involving suspect classifications are subject to strict scrutiny); Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to a suspect class). If a court recognizes an important substantive right as opposed to a fundamental right, it will apply a heightened level of review adopting an intermediate level of review. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate level of review to gender classification); Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980) (applying an intermediate level of review to a right to full recovery). The United States Supreme Court restricted the application of the intermediate level of review to classifications involving gender or illegitimacy. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978) (applying intermediate level of review to the classification of illegitimate children); *Craig*, 429 U.S. at 197 (stating that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); Reed v. Reed, 404 U.S. 71, 75 (1971).

57. *Sibley*, 462 So. 2d at 155; *Lucas*, 757 S.W.2d at 695. *See* cases cited *supra* note 54.

58. *Jones*, 555 P.2d at 399 (applying a rational basis test "with teeth"); *see also*, Morris v. Savoy, 576 N.E.2d 765, 777-78 (Ohio 1991) (Sweeney, J., dissenting) (applying strict scrutiny); *Carson*, 424 A.2d at 825 (applying an intermediate level of review); *Arneson*, 270 N.W.2d at 125 (applying an intermediate level of review).

59. *Morris*, 576 N.E.2d at 771; *accord* Davis v. Omitowoju, 883 F.2d 1155, 1158 (3d Cir. 1989); Boyd v. Bulala, 647 F. Supp. 781, 787-88 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgement to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989) (affirming constitutionality of statutory caps); Fein v. Permanente Medical Group, 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 745-46 (Ill. 1976) (Underwood, J., dissenting) (quoting Davis v. Commonwealth Edison Co., 336 N.E.2d 881, 883 (Ill. 1975)); Johnson v. Saint Vincent Hosp., Inc., 404 N.E.2d 585, 594 (Ind. 1980); Sibley v.

In challenging statutory caps on equal protection grounds, opponents of the caps argue that statutory caps create discriminatory classifications of victims and tortfeasors.[60] Opponents of the caps argue that these discriminatory classifications are unconstitutional because they are not rationally related to a legitimate state purpose.[61] The constitutionality of statutory caps hinges on the application of the lowest standard of judicial review and rests on the judicial determination of the nexus between the legislative goal of easing the medical malpractice crisis and the use of statutory caps as a means of attaining this goal.

1. Jurisdictions Holding that Statutory Caps Violate the Equal Protection Clause

a. Rational Basis Test

Courts in a number of jurisdictions applied the rational basis test to statutory caps.[62] In *Waggoner v. Gibson*,[63] the District Court for the Northern District of Texas applied the traditional rational basis test: Whether there is a rational relationship between the legislation and the pursuit of a legitimate state interest.[64] The court held that the statutory cap violated the equal protection clause under both the state and the federal constitutions because limitation of recovery for the most deserving victims of malpractice was not a legitimate state interest.[65] Further, the cap served no legitimate state inter-

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Board of Supervisors of La. State Univ., 462 So. 2d 149, 155 (La. 1985); Prendergast v. Nelson, 256 N.W.2d 657, 667-68 (Neb. 1977); *Lucas*, 757 S.W.2d at 695 (Gonzalez, J., dissenting); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989).

60. *Morris*, 576 N.E.2d at 771-72; *Carson*, 424 A.2d at 830. These classifications include: (1) medical malpractice victims whose damages exceed the statutory cap and those victims whose damages do not exceed the cap, Jones v. State Bd. of Medicine, 555 P.2d 399, 410 (Idaho 1976); *see also Fein*, 695 P.2d at 682; *Wright*, 347 N.E.2d at 741; *Morris*, 576 N.E.2d at 772; Lucas v. United States, 757 S.W.2d 681, 695 (Tex. 1988) (Gonzalez, J. dissenting), (2) health care tortfeasors and other tortfeasors, Carson v. Maurer, 424 A.2d 825, 830 (N.H. 1980), and (3) medical malpractice victims and other tort victims. *Id.*; *Fein*, 695 P.2d at 682; *Morris*, 576 N.E.2d at 771.

61. *Wright*, 347 N.E.2d at 741; *see* Waggoner v. Gibson, 647 F. Supp. 1102, 1106 (N.D. Tex. 1986); *Morris*, 576 N.E.2d at 780 (Sweeney, J., dissenting); Duren v. Suburban Community Hosp., 482 N.E.2d 1358, 1362 (Ohio C.P. 1985).

62. *Waggoner*, 647 F. Supp. at 1106; *Morris*, 576 N.E.2d at 771; *accord Fein*, 695 P.2d at 683; *Wright*, 347 N.E.2d at 745-46 (Underwood, J., dissenting); *Sibley*, 462 So. 2d at 155; *Lucas*, 757 S.W.2d at 695 (Gonzalez & Culver, J.J., dissenting); *Etheridge*, 376 S.E.2d at 534.

63. 647 F. Supp. 1102 (N.D. Tex. 1986).

64. *Id.* at 1106.

65. *Id.* The statutory cap means that a jury may award damages up to the cap for a slightly injured patient but that a patient who is permanently injured and severely disabled is entitled to no greater compensation. *Id.* The slightly injured victim is not affected by the statute; however, the most severely injured is greatly handicapped by the cap's application. *Id.* at 1106 n.8.

est because no corresponding societal quid pro quo[66] existed to replace the victim's right of full recovery.[67] More importantly, the cap did not adequately compensate patients with meritorious claims and provided no means of eliminating frivolous claims.[68] The court concluded that the detrimental effect of the cap on the most deserving victims was not vitiated by the existence of a medical malpractice insurance crisis.[69] Thus, the statutory cap did not meet the rational basis test.[70] This reasoning suggests that statutory caps are not an adequate means of resolving the medical malpractice insurance crisis because caps fail to discourage nonmeritorious claims and force the most severely injured to bear the burden of the malpractice insurance crisis.

One court also applied a rational basis test "with teeth."[71] In *Jones v. State Board of Medicine*,[72] the Supreme Court of Idaho applied the following heightened rational basis test: Whether the statute is reasonably related to a public purpose and whether the establishment of the classification has a fair and substantial relationship to the achievement of the legislature's objective or purpose.[73] The *Jones* court remanded the case for the determination of questions pertinent to the equal protection challenge.[74]

66. The quid pro quo concept means that the victim or society receives a benefit that offsets the benefit of limited liability received by health care providers. Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976) (stating that "loss of recovery potential to some malpractice victims is offset by lower insurance premiums and lower medical care costs for all recipients of medical care"); *see also* Jones v. State Bd. of Medicine, 555 P.2d 399, 408-09 (Idaho 1976) (explaining that quid pro quo means the availability of a reasonable substitute for the severely injured malpractice victim), *cert. denied*, 431 U.S. 914 (1977).

67. *Gibson*, 647 F. Supp. at 1106 (citing Arneson v. Olson, 270 N.W.2d 125, 135 (N.D. 1978)); *Wright*, 347 N.E.2d at 742-43; Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980).

68. *Gibson*, 647 F. Supp. at 1106-07.

69. *Id.* at 1107. The court concluded that concerns about the medical profession and the insurance industry cannot overrun the concern for the victims who are most seriously injured by malpractice. *Id.*

70. *Id.*

71. Jones v. State Bd. of Medicine, 555 P.2d 399, 410-11 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977).

72. 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977).

73. *Id.* at 411. The court determined that strict scrutiny was not appropriate because there was neither a suspect class nor an infringement on the exercise of a fundamental right. *Id.* at 410.

74. *Id.* at 416. The court concluded that there was a medical malpractice insurance crisis but that insufficient evidence existed on a local level to properly evaluate the constitutional issue. *Id.* at 416. The court found that there was an insufficient factual basis regarding the purported correlation between the statutory caps on a victim's recovery and the promotion of health care for the people of the state. *Id.* at 411.

b. Intermediate Level of Review

Several courts applied an intermediate level of review to invalidate statutory caps.[75] In *Carson v. Maurer*,[76] the Supreme Court of New Hampshire determined that the right to recover damages for personal injury was an important substantive right.[77] The court imposed an intermediate level of review because the right to recover in tort was sufficiently important to require that restrictions imposed on the right be subjected to a standard of review more rigorous than the rational basis test.[78] The test employed by the court was whether the classifications created by the statutory cap rest on "some ground of difference having a fair and substantial relation to the object of the legislation."[79] The court held that the necessary "fair and substantial" relationship between the caps and the legislature's objective[80] was tenous for several reasons.[81] First, the damage awards paid by insurance companies to victims were only a portion of the total insurance premium costs; second, few individuals actually suffered noneconomic damages in excess of the cap.[82] Most importantly, the recovery limitation did not discour-

75. *See* Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) (quoting Johnson v. Hassett, 217 N.W.2d 771, 775 (N.D. 1974)) (asking whether there is a "close correspondence between the statutory classification and the legislative goals"). For a related view, see the dissenting opinion of Justice Mosk in Fein v. Permanente Medical Group, 695 P.2d 665, 694 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985), which argued that the appropriate level of judicial review was an intermediate level of review because the rational basis test and strict scrutiny standard were rigid extremes that should be avoided in such an important area. *Id.* at 695. For a more expansive approach, see Chief Justice Bird's dissent, in *Fein*, which formulated a two-tier intermediate level of review because, in his opinion, the medical malpractice crisis was over. *Id.* at 687. Justice Bird asserted that courts should examine medical malpractice legislation more closely and should not defer to the legislature's resolution of the crisis. *Id.* at 687-88.

76. 424 A.2d 825 (N.H. 1980).

77. *Id.* at 830.

78. *Id.* at 830-31. The court found that the right to recover in tort is not a fundamental right and that the classification of malpractice victims does not involve a suspect class. *Id.* at 830. Accordingly, strict scrutiny does not apply. *Id.*

79. *Id.* at 831. To be justified as a reasonable measure in furthering the public interest and well-being, the statute must not impose serious restrictions on private rights that outweigh the benefits conferred upon society. *Id.*

80. The legislature's goal was the reduction of malpractice insurance rates and the stabilization of insurance risks. *Id.* at 836. The court noted that statutory caps were intended to codify and to stabilize the law of medical malpractice and to improve the availability of adequate insurance for health care providers at a reasonable cost. *Id.* at 830. This goal would be achieved by ensuring that insurance companies would not compensate victims for noneconomic damages in excess of the cap. *Id.* at 836.

81. *Id.*

82. *Id.*

age or eliminate nonmeritorious claims.[83] Rather, statutory caps had the exact opposite effect. Statutory caps failed to adequately compensate the most severely injured victims who had meritorious claims.[84] The court concluded that "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[85]

c. Strict Scrutiny

No court majority applied strict scrutiny in reviewing the constitutionality of statutory caps. In *Morris v. Savoy*,[86] Ohio Supreme Court Justice Sweeney, in a persuasive dissenting opinion, argued that courts should apply strict scrutiny[87] because malpractice legislation impinged on the exercise of the fundamental constitutional right to a jury trial.[88] Justice Sweeney further argued that the cap on damages violated equal protection because there was no evidence to show that the cap was reasonably related to the legislative goal of reducing malpractice insurance rates.[89] Thus, the cap could not

83. *Id.* at 837 (quoting Arneson v. Olson, 270 N.W.2d 125, 135 (N.D. 1978), which adopted this same reasoning regarding meritorious and nonmeritorious claims).

84. *Carson*, 424 A.2d at 837; *see* Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (stating that "[r]estrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims").

85. *Carson*, 424 A.2d at 837. Compare Chief Justice Bird's dissent in Fein v. Permanente Medical Group, 695 P.2d 665, 690 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985), which contended that there was no logical reason why the most severely injured should pay for special relief to medical tortfeasors and their insurance companies. *Id.* Chief Justice Bird concluded that statutory caps were an arbitrary classification and could not be justified on the grounds of the medical malpractice insurance crisis because the essential purpose of insurance is to spread the costs of risk over a large number of people so that no one person must bear the burden. *Id.* at 690-91. The classification is extremely underinclusive and unconstitutional because the burden falls on the most severely injured medical malpractice victims. *Id.* at 692.

86. Morris v. Savoy, 576 N.E.2d 765, 777-78 (Ohio 1991) (Sweeney, J., dissenting).

87. The strict scrutiny test focuses on whether the classification is necessary to further a compelling state or government interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Korematsu v. United States, 323 U.S. 214, 216 (1944); *Morris*, 576 N.E.2d at 781.

88. *Morris*, 576 N.E.2d at 780-81.

89. *Id.* at 781. The dissent criticized the majority's logic:

> [T]he majority concludes that there is no evidence to show that the . . . [cap] on medical malpractice damages is rationally related to the achievement of the state's objective to reduce medical malpractice insurance rates. How then can the majority conclude, in its equal protection analysis, that the statutory classification created by . . . [the cap] rationally furthers a legitimate legislative objective where there is admittedly no evidence to support that conclusion? Further, in its due process analysis, the majority concludes that . . . [the cap] is unreasonable and arbitrary. How then can the majority say, in its equal protection analysis, that [the cap] 'rationally furthers' a legitimate governmental interest?

Id.

further a compelling state interest.[90] Accordingly, Justice Sweeney's dissent concluded that the cap violated the equal protection clause of both the federal and the state constitutions.[91]

2. *Jurisdictions Holding that Statutory Caps Do Not Violate the Equal Protection Clause*

Courts uniformly applied the rational basis test[92] in holding that statutory caps did not violate the equal protection clause of state or federal constitutions.[93] Under rational basis review, many courts determined that statutory caps on damages are rationally related to the resolution of the medical malpractice crisis and that they are rationally related to the goal of providing reasonable affordable health care to the public.[94] Rational basis review demands significant judicial deference to legislative action.[95] As a result courts often deferred to the legislature's judgment on the best means of resolving the insurance crisis.[96]

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90. *Id.*

91. *Id.*

92. Courts consistently have held that the right to sue in tort for full recovery of an injury was not a fundamental right and that malpractice legislation did not involve a suspect classification. Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 157 (La. 1985); Boyd v. Bulala, 647 F. Supp. 781, 786-87 (W.D. Va. 1986) (holding that the right to full recovery in tort is not implicitly or explicitly guaranteed by the Constitution), *modified*, 678 F. Supp. 612 (W.D. Va. 1988)(amending judgment to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989) (affirming the constitutionality of statutory caps in medical malpractice actions). Since there was no suspect class nor infringement on a fundamental right, the statute must be upheld if it is reasonably related to a valid legislative purpose. *Boyd*, 647 F. Supp. at 786-87; *see also* Lucas v. United States, 757 S.W.2d 687, 695 (Tex. 1988) (Gonzalez, J., dissenting) (stating that the right to sue in tort for an injury was not a fundamental right); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 534 (Va. 1989) (concluding that there was no suspect class and that the classification did not impinge on the exercise of a fundamental right).

93. *Boyd*, 647 F. Supp. at 786-87 (noting that this statutory limitation on recovery was a classic economic regulation and accordingly was entitled to judicial deference); *see* Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 155-57 (La. 1985) (stating that a limitation on recovery was a classic example of economic legislation and accordingly, the legislation would be afforded great deference when evaluating equal protection challenges). *See* cases cited *supra* note 92.

94. Fein v. Permanente Medical Group, 695 P.2d 665, 684 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); Morris v. Savoy, 576 N.E.2d 765, 770-71 (Ohio 1991); *see also* Davis v. Omitowoju, 883 F.2d 1155, 1158 (3d Cir. 1989); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 745-46 (Ill. 1976) (Underwood, J., dissenting); *Sibley*, 462 So. 2d at 156; Williams v. Kushner, 549 So.2d 294, 305 (La. 1989) (Dixon, J., dissenting); Prendergast v. Nelson, 256 N.W.2d 657, 668 (Neb. 1977); *Lucas*, 757 S.W.2d at 694-95 (Gonzalez, J., dissenting); *Etheridge*, 376 S.E.2d at 534 (reasoning that courts should defer to the legislature's judgment as to how the malpractice crisis will be best addressed).

95. *Boyd*, 647 F. Supp. at 786.

96. *Id.* at 786; *Etheridge*, 376 S.E.2d at 534; *Sibley*, 462 So. 2d at 156. *See* cases cited

In *Boyd v. Bulala*,[97] the District Court for the Western District of Virginia applied the rational basis test to statutory caps and found the statutory limitation on recovery was a classic economic regulation and entitled to judicial deference.[98] The court reasoned that although facially unfair, the classifications, created by the malpractice legislation, did not violate equal protection guarantees.[99] The court found that the purpose of the legislation was to maintain an adequate level of health care services in Virginia by ensuring that health care providers obtain affordable malpractice insurance.[100] The court held that this purpose was a sufficient justification for the discriminatory effect of the legislation.[101] The court compared the burden imposed on malpractice victims with the burden placed on the welfare families in *Dandridge v. Williams*,[102] and concluded that the burden on malpractice victims "certainly pass[ed] constitutional muster under the rule of *Dandridge*."[103] The court held that the medical malpractice cap on damages was a rational means of achieving affordable insurance and of ensuring the availability of adequate health care for the Commonwealth.[104]

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supra notes 92-3. Under this standard, the court's role is not to determine the wisdom of the act but rather its rational basis. *Morris*, 576 N.E.2d at 770-71 (noting that the role of the judiciary is not to act as a super legislature judging the wisdom and desirability of a legislative policy); *Lucas*, 757 S.W.2d at 695. Equal protection analysis has never been interpreted to permit the court to strike down legislation because the judiciary disagrees with it or thinks it is unwise. *Fein*, 695 P.2d at 684. The court's duty is to prevent invidious discrimination inconsistent with the Constitution. *Lucas*, 757 S.W.2d at 695. Courts recognize that the choice between alternate methods for obtaining an objective is generally within the legislature's province, *Fein*, 695 P.2d at 683, and equal protection merely requires that the legislature chose a method which is rationally related to their permissible objective. *See id.* at 684.

97. 647 F. Supp. 781 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgment to reflect settlement), *aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989) (affirming constitutionality of caps on medical malpractice damages).

98. *Id.* at 786.

99. *Id.* The law treated victims of malpractice differently from other tort victims and the law discriminated between those plaintiffs whose losses exceeded the cap and those whose losses did not. *Id.*

100. *Id.*

101. *Id.*

102. 397 U.S. 471, 483 (1970). In *Dandridge*, the Supreme Court upheld Maryland's administration of the Federal Aid to Families with Dependent Children Program. Under this need-based program, Maryland limited the total amount of assistance a family could receive, placing a burden on larger families who would receive the same amount with a larger number of dependents to use the money. *Id.*

103. Boyd v. Bulala, 647 F. Supp. 781, 787 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgement to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989).

104. *Id.*

3. Summary of Equal Protection Challenges

In conclusion, the standard of review used by courts will determine whether statutory caps violate equal protection guarantees. In invalidating statutory caps, courts will often utilize varying degrees of judicial scrutiny as a result of the concern that the right to recovery, particularly in medical malpractice actions, is a very important substantive right that should be seriously guarded from infringement. Consequently, courts are reluctant to afford the legislature a high degree of judicial deference. This reluctance is illustrated by the inconsistent application of the various levels of judicial scrutiny when reviewing statutory caps under an equal protection analysis. Opponents of the cap should stress the important substantive right of full recovery and the burden placed on the most seriously injured. Thus, courts may be more likely to apply a higher standard of review and strike down the caps as unconstitutional.

In upholding statutory caps, courts focus on the public need for adequate health care at a reasonable cost. Accordingly, the courts afford the legislature significant deference in determining whether statutory caps will ease the malpractice insurance crisis. Proponents of the caps should argue that these caps are, in effect, economic legislation aimed at ensuring adequate health care at a reasonable cost. Accordingly, the court should defer to the legislature and uphold the statutory caps as constitutional. In reviewing the constitutionality of statutory caps, courts frequently fail to recognize the burden placed upon the most severely injured and do not determine whether, as a matter of policy, it is appropriate to shift the burden from the tortfeasor to the victim.

B. The Due Process Clause

Another common constitutional challenge to statutory caps is under the due process clause of the state or federal constitution.[105] In reviewing statutory caps under substantive due process, courts consistently apply a reasona-

105. Due process of the law has both substantive and procedural aspects. Substantive due process guarantees judicial review of government action which interferes or restricts the freedom of individual action involving life, liberty or property. NOWACK, *supra* note 56, at 350. Substantive due process protects fundamental constitutional rights and voids arbitrary or unreasonable limitations on the individual's freedom of action. *Id.* at 452. Procedural due process ensures that an individual is given a right to reasonable notice and a meaningful opportunity to be heard. Parratt v. Taylor, 451 U.S. 527, 540 (1981); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 530 (Va. 1989). The purpose of procedural due process is to ensure that adequate procedural safeguards are employed to prevent an arbitrary government deprivation of constitutionally protected interests. Leis v. Flunt, 439 U.S. 438, 441 (1979); *Etheridge*, 376 S.E.2d at 530.

bleness test:[106] Whether the legislation is reasonably related to a proper legislative goal and is neither arbitrary nor discriminatory.[107] Courts, however, formulate various frameworks in determining whether the statutory caps are reasonably related to a proper legislative goal.[108] In reviewing procedural due process challenges to the constitutionality of statutory caps, courts focus on whether the procedural aspects of notice and hearing are guaranteed or protected by the legislation.[109]

1. Jurisdictions Holding that Statutory Caps Violate Substantive Due Process

In *Morris v. Savoy*,[110] the Supreme Court of Ohio applied a reasonableness test and determined that the statutory cap on noneconomic damages violated the due process clause of the state constitution.[111] The court held that it was unreasonable and arbitrary to impose the cost of adequate health care for the general public on the severely injured victims of medical malpractice.[112] The language of the statute clearly showed that it was aimed at resolving the medical malpractice crisis by reducing insurance rates.[113] The court cited a 1987 study by the Insurance Service Organization, the rate setting arm of the

106. Johnson v. Saint Vincent Hosp., Inc., 404 N.E.2d 585, 599 (Ind. 1980); *accord Boyd*, 647 F. Supp. at 787-88; Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 257 (Kan. 1988) (declaring caps unconstitutional as a violation of the due process clause and the "open courts" provision"); Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 157 (La. 1985). *See* Fein v. Permanente Medical Group, 695 P.2d 665, 679-80 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985); Jones v. State Bd. of Medicine, 555 P.2d 399, 409 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977); Morris v. Savoy, 576 N.E.2d 765, 770-71 (Ohio 1991); *Etheridge*, 376 S.E.2d at 530.

107. *Lucas*, 757 S.W.2d at 695-6; *see Etheridge*, 376 S.E.2d at 530 (holding that substantive due process tests the reasonableness of a statute with respect to the legislative power to enact the statute).

108. Substantive due process requires that the legislation be a reasonable means to effectuate a legitimate legislative purpose. United States v. Carolene Products, 304 U.S. 144, 152 (1938). Traditionally, substantive due process challenges face a high degree of judicial deference. *Id.*; Boyd v. Bulala, 647 F. Supp. 781, 787-88 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgment to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989). Courts will resolve doubts in favor of the legislation's presumed validity. *Etheridge*, 376 S.E.2d at 531 (stating that a statutory limitation on recovery is an economic regulation afforded judicial deference). Courts have upheld legislation under the due process clause if there were any facts known or reasonably inferable to support the legislation. *Carolene Products*, 304 U.S. at 152. Courts will not overturn unwise, impolite, or unjust acts as a violation of substantive due process. *Bell*, 757 P.2d at 257.

109. Etheridge v. Medical Center Hosps., 376 S.E.2d 525, 530 (Va. 1989).

110. 576 N.E.2d 765 (Ohio 1991).

111. *Id.* at 770-71.

112. *Id.* at 771.

113. *Id.* at 770.

insurance industry, that indicated that tort reforms including statutory caps had little, if any, effect on insurance rates.[114] Thus, the court concluded that statutory caps were an inappropriate means of stabilizing insurance rates and that they merely shifted the burden of the insurance crisis from the health care providers to the health care recipients.[115]

In determining whether statutory caps satisfy due process requirements, some courts focused on the availability of an adequate alternative remedy for the infringement of the common law right to recovery.[116] In *Kansas Malpractice Victims Coalition v. Bell*,[117] the Supreme Court of Kansas stated that the legislature may modify common law remedies as dictated by public policy concerns.[118] The legislature, however, must provide an adequate substitute remedy, or quid pro quo, for the modification or abolishment of common law rights or remedies.[119] The court determined that a medical malpractice claim fell within the rubric of a common law right because the foundation for medical malpractice claims was the common law right to recovery in negligence cases.[120] In enacting statutory caps, the legislature attempted to substitute the common law right of a remedy with the societal benefits of a guaranteed recovery against doctors and availability of adequate health care at a reasonable cost.[121] The court concluded that these substitutes were already available in the state health care laws, and that the legisla-

114. *Id.* at 771.

115. *Id.* at 769.

116. The concept of an alternative adequate remedy is known as quid pro quo, or "this for that." Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 259 (Kan. 1988).

117. 757 P.2d 251 (Kan. 1988).

118. *Id.* at 260.

119. *Id.* at 263. For a related view on the modification of a common law right, compare Justice Holmes' dissenting opinion in Morris v. Savoy, 576 N.E.2d 765, 774 (Ohio 1991) which articulated a two-prong analysis used when the legislature has modified or abolished a common law right. A statute violates substantive due process if (1) the modification of a common law right interferes with a vested property right and (2) the modification does not contain a permissible legislative objective. *Id.* at 775. Justice Holmes argued that the cap met both prongs of the test and, therefore, was not a violation of substantive due process. *Id.* The dissent argued that the cap, as a limitation on the recovery of non-economic damages in a common law cause of action, did not interfere with a vested property right because there was no vested property right in a common law cause of action. *Id.* Second, the cap was intended to achieve a reasonably permissible legislative objective of alleviating the medical malpractice crisis. *Id.* Justice Holmes concurred with the state legislature that the caps would prevent unpredictable jury verdicts and permit insurers and health care providers to adequately assess rates and the amounts of premiums in order to determine the appropriate amount of coverage and protection. *Id.* at 776. Justice Holmes concluded that the discriminatory effect of the cap was justified because of the resulting stabilization of the malpractice crisis and the ensured availability of affordable and adequate health care. *Id.* at 776-77.

120. *Bell*, 757 P.2d at 258.

121. *Id.* at 263. This common law right to a remedy is a remedy for all injuries not a few. *Id.*

tion provided adequate alternative remedies for the victim.[122] In effect, the cap forced every medical malpractice victim to make an involuntary contribution to the medical malpractice insurance industry.[123] Accordingly, the court held that the statutory caps on medical malpractice damage awards infringed upon the common law right to recovery without providing an adequate alternative remedy, or, quid pro quo as is required by due process.[124] Consequently, the statutory cap was struck down as unconstitutional.

2. *Jurisdictions Holding that Statutory Caps Do Not Violate Substantive Due Process*

Courts uniformly applied the reasonableness test in holding that statutory caps were consistent with substantive due process requirements.[125] In *Etheridge v. Medical Center Hospitals*,[126] the Supreme Court of Virginia applied the reasonableness test and determined that the cap was reasonably related to the legislature's goal of maintaining adequate health care services.[127] The court deferred to the Virginia General Assembly's findings[128] and decision to limit the amount of recovery in medical malpractice cases.[129]

Courts also rejected the quid pro quo test as a requirement of substantive due process.[130] In *Fein v. Permanente Medical Group*,[131] the Supreme Court

122. *Id.* at 263-64.

123. *Id.* at 264.

124. *Id.*

125. Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 530 (Va. 1989); *accord* Boyd v. Bulala, 647 F. Supp. 781, 787-88 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (judgment amended to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191, 1196 (4th Cir. 1989) (affirming constitutionality of caps on medical malpractice damages); Johnson v. Saint Vincent Hosp., Inc., 404 N.E.2d 585, 599 (Ind. 1980); Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 157 (La. 1985). See *supra* notes 106-07 and accompanying text.

126. 376 S.E.2d 525 (Va. 1989).

127. *Id.* at 531.

128. The General Assembly concluded that the escalating costs of medical malpractice insurance were affecting the availability of insurance and health care. *Id.* at 531. This was a substantial problem affecting the public health, safety, and welfare. *Id.* Accordingly, the General Assembly made a judgment that the statutory caps were an appropriate means of addressing this problem. *Id.* at 527-28.

129. *Id.* at 531.

130. *See* Jones v. State Board of Medicine, 555 P.2d 399, 406 (Idaho 1976) (rejecting the quid pro quo test of substantive due process and stating that the sole standard of judicial review for substantive due process challenges was whether the law bears "a [reasonable or] rational relationship to the preservation and promotion of the public welfare"), *cert. denied*, 431 U.S. 914 (1977); *see also* Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgment to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191, 1197 (4th Cir. 1989) (holding that the quid pro quo argument is based on an unsound premise, citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 82-4 (1978), which did not mention quid pro

of California reasoned that substantive due process did not require that legislation be fair, nor did substantive due process require an adequate quid pro quo.[132] Accordingly, the court concluded that despite the lack of any quid pro quo, the cap was rationally related to the legitimate state interest of curbing the medical malpractice crisis.[133] The court noted that the rising cost of insurance threatened the health care system in the state by limiting the availability of medical care and threatened to leave physicians uninsured.[134] The court reasoned that if there were no reduction in the escalating insurance costs, plaintiffs might have a difficult time collecting judgments for any damages against judgment-proof, uninsured doctors.[135] Thus, it was in the public interest to reduce insurance costs by limiting noneconomic damages.[136]

In *Johnson v. Saint Vincent Hospital*,[137] the Supreme Court of Indiana rejected the argument that limitation upon recovery created an irrebuttable presumption that a victim's loss never exceeded the cap, and precluded the victim from proving otherwise.[138] The court held that a "statute cannot survive a due process challenge if it denies rights and benefits on the basis of facts presumed to exist and to be true, without affording the individual an opportunity to defend those facts."[139] The court concluded that the cap neither created such an evidentiary presumption nor forced the trier of fact to infer that the patient's damages were less than the statutory cap.[140] Recovery of damages was limited by a state policy not as the result of an evidentiary presumption.[141] Accordingly, the cap did not violate substantive due process.[142]

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quo as a necessary requirement of substantive due process guarantees); Davis v. Omitowoju, 883 F.2d 1155 (3d Cir. 1989) (finding no merit in due process or equal protection challenges by adopting the reasoning of *Boyd*).

131. 695 P.2d 665 (Cal.), *appeal dismissed*, 474 U.S. 892 (1985).
132. *Id.* at 679.
133. *Id.* at 680.
134. *Id.*
135. *Id.* at 681.
136. *Id.*
137. 404 N.E.2d 585 (Ind. 1980).
138. *Id.* at 599.
139. *Id.*; Vlandis v. Kline, 412 U.S. 441, 446 (1973).
140. *Johnson*, 404 N.E.2d at 600.
141. *Id.*
142. *Id.*

3. *Jurisdictions Holding that Statutory Caps Do Not Violate Procedural Due Process*

In *Etheridge v. Medical Center Hospital*,[143] the Supreme Court of Virginia held that the cap did not violate procedural due process because the cap had no effect on the right to a decision based upon the merits of each individual case and that the plaintiff was not denied reasonable notice and a meaningful opportunity to be heard.[144] The plaintiff argued that because the statute effectively preordained the result of a hearing, she was thereby denied due process.[145] The court rejected this argument and determined that the plaintiff was not denied reasonable notice or a meaningful opportunity to be heard.[146] Specifically, the court found that the cap neither created a presumption that a plaintiff's damages could not exceed the cap nor created any presumptions regarding the individual merits of the plaintiff's medical malpractice claim.[147] The cap only affected the parameters of available remedies after the court or jury determined the merits of the case.[148] Accordingly, the cap did not violate procedural due process guarantees.

4. *Summary of Due Process Arguments*

Under the due process clause, successfully challenging statutory caps on either procedural or substantive grounds is very difficult. Under a substantive due process challenge, courts consistently apply the reasonableness test, affording the legislature a high degree of judicial deference. Proponents of the cap should stress the reasonable relationship between the cap and the predictability of the rate structure and premiums once the possibility of high erratic jury awards has been eliminated. Opponents of the cap should provide quantitative evidence that statutory caps have little impact on the medical malpractice crisis in order to undercut the presumption of the legislation's validity and to undermine the "reasonable" relationship between statutory caps and the malpractice crisis. Invalidation of statutory caps as a violation of procedural due process is highly unlikely unless the effect of the statutory cap preempts the jury's determination of the merits of the medical malpractice cause of action.

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143. 376 S.E.2d 525 (Va. 1989).

144. *Id.* at 531.

145. *Id.* at 530.

146. *Id.* at 531.

147. *Id.* at 530-31.

148. *Id.* at 531.

C. Seventh Amendment Right to a Jury Trial

While due process and equal protection arguments focus on the level of scrutiny in determining the constitutionality of caps, Seventh Amendment[149] challenges focus on the interpretation of the scope of the jury's function. The Seventh Amendment[150] embodies this nation's commitment to an individual's right to a trial by jury.[151] To be meaningful, the Seventh Amendment must protect the ability of the jury to make a difference in the outcome of the trial through its determination of damages.[152] Whether the statutory caps restrict the jury's function as the fact-finding body hinges on the interpretation of the scope of the jury's role and the weight afforded the right to a trial by jury.

1. Jurisdictions Holding that Statutory Caps Violate the Seventh Amendment Right to a Jury Trial

In *Boyd v. Bulala*,[153] the District Court for the Western District of Virginia held that the statutory cap violated the Seventh Amendment right to a jury trial when proven damages exceeded the amount of the cap.[154] When a court refused to enter judgment for the full amount of a verdict which exceeded the cap, the court essentially invalidated a jury fact-finding.[155] By limiting the jury's determination of fact, the court limited the role of the jury.[156] Thus, the cap violated the Seventh Amendment because it restricted the jury's function as the trier of fact.[157]

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149. The Seventh Amendment states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law." U.S. CONST. amend. VII.

150. The Seventh Amendment aims to preserve the substance of the common law right to a trial by jury by distinguishing the province of the court and that of the jury. Boyd v. Bulala, 672 F. Supp. 915, 919 (W.D. Va. 1987), *modified*, 678 F. Supp. 612, 619 (W.D. Va.1988), *and aff'd in part, rev'd in part and certifying questions to*, 677 F.2d 1191, 1196 (4th Cir. 1989) (affirming constitutionality of caps on medical malpractice damages). The jury's traditional role is to decide issues of fact including the assessment of damages. Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 258 (Kan. 1988); Morris v. Savoy, 576 N.E.2d 765, 778 (Ohio 1991).

151. *Boyd*, 672 F. Supp. at 918.

152. *Id.* at 920-21. Thus, the jury's assessment of damages falls within the protection of the Seventh Amendment. *Id.* at 920.

153. 647 F. Supp. 781 (W.D. Va. 1986), *modified*, 678 F. Supp. 612 (W.D. Va. 1988) (amending judgment to reflect settlement), *and aff'd in part, rev'd in part and certifying questions to*, 877 F.2d 1191 (4th Cir. 1989) (affirming constitutionality of statutory caps).

154. 672 F. Supp. 915, 919 (W.D. Va. 1987).

155. *Boyd*, 647 F. Supp. at 788.

156. *Id.* at 788-89.

157. *Id.* at 789. In *Boyd*, the court noted that the legislature may pass measures which impact the way a jury determines factual issues. *Id.* For example, the legislature may enact

The Court of Appeals for the Fourth Circuit, without discussing the district court's reasoning, reversed the district court holding that the cap did not violate the Seventh Amendment right to a jury trial.[158] The court of appeals reasoned that although the jury acted as a fact-finder in its determination of damages, the jury does not ascertain the legal consequences of its factual findings.[159] Such a conclusion is within the legislature's province.[160] Accordingly, the court of appeals found that the cap was a legal consequence of the jury's determination of liability. The court concluded that once the jury made its factual findings with respect to damages, it fulfilled its constitutional function.[161] This single case illustrates that the constitutionality of the cap based on the Seventh Amendment right to a jury trial hinges on the court's interpretation of the scope of the jury's role and function.

2. *Jurisdictions Holding that Statutory Caps Do Not Violate the Seventh Amendment Right to a Jury Trial*

In *Davis v. Omitowoju*,[162] the plaintiff argued that the district court, in enforcing the statutory cap on the jury verdict, reexamined a fact determined by the jury which is contrary to the second clause of the Seventh Amendment.[163] The court concluded that the framers' intent was to preclude judges from reexamining the facts determined by the jury.[164] The Seventh Amendment, however, does not prohibit legislatures from making a rational policy decision in the public interest which may, in effect, reexamine a jury's findings of fact.[165] Although the cap, as a legislative measure, effectively reexamined a factual determination by the jury, it did not violate the Seventh Amendment prohibition against judiciary reexamination of jury fact findings.

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rules of procedure, rules of evidence, and may allocate burdens of proof. *Id.* The legislature, however, may not preempt jury findings on a factual issue which has properly been submitted to the jury. *Id.* at 789-90. The legislature was prohibited from dictating the amount of a judgment to be entered into at trial. *Id.* at 790. This course of conduct by the legislature would infringe upon the proper functioning of the judiciary and violate the separation of powers doctrine. *Id.* Accordingly, the court found that the cap violated the Seventh Amendment right to a jury trial.

158. Boyd v. Bulala, 877 F.2d 1191, 1195 (4th Cir. 1989).

159. *Id.*

160. *Id.*

161. *Id.*

162. 883 F.2d 1155 (3d Cir. 1989)

163. *Id.* at 1159. *See supra* note 149. The second clause of the Seventh Amendment guarantees protection from a biased judiciary by providing that the fact-finding of a jury is final. *Davis*, 883 F.2d at 1164.

164. *Id.* at 1165.

165. *Id.*

3. Summary of Seventh Amendment Arguments

In conclusion, the court's interpretation of the scope of the right to a jury trial will determine the constitutionality of statutory caps under the Seventh Amendment. If the court interprets the right narrowly, the court may uphold the cap concluding that the statutory cap is applied only after the jury has reached its verdict and corresponding recovery. Consequently, the imposition of a cap does not infringe upon the jury's function as trier of fact. If, however, the court interprets the jury's role more broadly, the court may declare the cap unconstitutional as a violation of the Seventh Amendment. By refusing to enter judgment in the amount of the jury verdict, the court, in essence, invalidates the jury's determination of fact.

Legislatures have largely ignored the overriding policy concern of whether medical malpractice actions are suitable for jury determinations. Commentators have suggested that medical malpractice actions are not suitable for jury determinations because of the increasing body of technical medical knowledge used in malpractice actions.[166] Medical malpractice actions often contain complex issues that exceed the expertise of the jury or judge.[167] Thus, the role of expert testimony becomes paramount in adequately educating the jury in order to make them competent to decide the facts.[168] The crux of the problem is whether the experts can ever adequately educate the jury in order to render a competent decision.[169] The traditional benefits of the right to a jury trial are destroyed when a jury is unable to competently decide factual issues.[170] Therefore, the crux of the argument for the right to a jury trial is not the limitation on recovery imposed by a statutory cap but rather whether the jury can competently determine the complex factual issues in a medical malpractice action.

D. State Constitutional Challenges

Opponents of caps utilize four grounds to challenge statutory caps as a violation of state constitutional provisions. These approaches are the "open courts" provision, the prohibition against "special legislation," the right to a jury trial, and the separation of powers doctrine.

166. Paglia, *supra* note 45, at 59.

167. *Id.*

168. *Id.*

169. *Id.* at 60.

170. *Id.*

1. "Open Courts" Provision[171]

a. Jurisdictions Holding that Statutory Caps Violate the "Open Courts" Provision

In *Lucas v. United States*,[172] the Supreme Court of Texas held that statutory caps violated the "open courts" provision of the Texas Constitution.[173] The court utilized a two prong analysis whereby the litigant must show (1) that he had a cognizable common law cause of action which was being restricted by the legislation, and (2) that the restriction was unreasonable or arbitrary when balanced against the statute's purpose and basis.[174] The court concluded that victims of medical malpractice had a cognizable common law cause of action because their claim was based on an action for negligently inflicted harm.[175] The court focused the inquiry on the second prong,[176] holding that the restriction was unreasonable and arbitrary because the statute failed to provide an adequate substitute redress for the victim.[177] A societal quid pro quo[178] was insufficient.[179] There must be an individual quid pro quo.[180] The statute cannot be sustained by alleged benefits to society as a whole.[181] The court stated that it was unreasonable and arbitrary to limit the recovery of the most severely injured victims to deter-

171. The "open courts" provision guarantees the right of access to the courts. Arancibia, *supra* note 1, at 149.

> An open courts provision typically states: The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice.

Id. at 149 n.125.

172. 757 S.W.2d 687 (Tex. 1988).

173. *Id.* at 691. Article I, § 13 of the Texas Constitution, the "open courts" provision, provides two separate constitutional guarantees. *Id.* at 696. First, the clause that "all courts shall be open" guarantees the right to access. *Id.* Second, the clause that "every person . . . shall have remedy for injury by due course of law" guarantees the right to redress. *Id.*

174. *Id.* at 690; *see also* Waggoner v. Gibson, 647 F. Supp. 1103, 1108-09 (N.D. Tex. 1986) (noting that the same two requirements in the "open courts" provision).

175. *Lucas*, 757 S.W.2d at 690.

176. *Id.* at 691.

177. *Id.* at 690.

178. This quid pro quo has been defined as the loss of potential recovery to medical malpractice victims offset by lower insurance premiums and lower medical care costs for all recipients of medical care. *Id.*

179. *Id.*

180. The court noted that two jurisdictions that upheld damage caps provided alternative remedies such as a Patient Compensation Fund. *Id.* The court also noted that the legislature had the opportunity to create a Patient Compensation Fund to serve as an alternative remedy. *Id.* at 691. This suggests that the opinion may actually hinge on the quid pro quo argument and the existence of alternate remedies for the medical malpractice victims.

181. *Id.* at 690; *see also* Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986) (concluding that "[t]here is, effectively, no forum to which an injured party may appeal for

mine whether liability insurance rates would decrease.[182] It was also found to be unreasonable and arbitrary for the legislature to apply damage caps to the most severely injured with the goal of assuring a rational relationship between actual damages and amounts awarded.[183]

In *Lucas*, the court stated that the right of access to courts must be analyzed in conjunction with the right to trial by jury.[184] The court reasoned that the access to courts provision was designed to provide a means of redress for injuries.[185] A plaintiff who received a jury verdict which was eventually capped has not received a constitutional redress of injuries because the legislature arbitrarily capped the recovery.[186] Thus, a cap on a jury verdict denied the individual the benefit of a jury trial.[187] The court concluded that "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[188]

In *Waggoner v. Gibson*,[189] the District Court for the Northern District of Texas analyzed the "open courts" provision of the Texas Constitution[190] in a

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recompense of serious injuries due to malpractice; the legislature provides no adequate substitute to replace the traditional common law right of recovery").

182. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988); *see* Waggoner v. Gibson, 647 F. Supp. 1102, 1109 (N.D. Tex. 1986) (holding that a limit on the amount of recovery available to malpractice victims unreasonably displaces the common law cause of action when balanced against the purpose of the statute).

183. The court cited an independent study which concluded that no relationship existed between a damage cap and the increase in insurance rates. *Lucas*, 757 S.W.2d at 691. The court noted that less than .6% of all medical malpractice claims brought were for over the statutory cap of $100,000. *Id.* This suggests that the medical malpractice crisis was created not by high damage awards but by the mere increase in the number of claims brought.

184. *Id.* at 692.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 692 (quoting Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980)). For a related view, see Chief Justice Dixon's dissent in Williams v. Kushner, 549 So. 2d 294, 304 (La. 1989), which also asserted that statutory caps do not comport with the fundamental principles of the right to adequate remedy and the right to an open court. *Id.* at 311. Chief Justice Dixon reasoned that the recovery of damages is based on evidence; whereas, the valuation of damages is based on the trier of fact's discretion. *Id.* at 310-11. Chief Justice Dixon argued that the statutory cap on damages removes the individual discretionary element inherent in the valuation of damages. *Id.* at 311. He concluded that the discretionary element is replaced with a legislative determination of an adequate remedy. *Id.* Accordingly, the dissenting opinion concluded that the adequacy of a remedy in relation to the actual loss sustained is determined by considering both the evidence presented and individual discretion. *Id.*

189. 647 F. Supp. 1102, 1108 (N.D. Texas 1986).

190. Article I, Section 13 of the Texas Constitution mandates that "all courts be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Waggoner*, 647 F. Supp. at 1108.

due process framework utilizing a three prong test.[191] The court concluded that the statutory cap satisfied all three prongs.[192] First, the limitation on the damage recovery of malpractice victims was a restriction on a common law cause of action.[193] Second, the restriction was arbitrary and unreasonable when balanced against the purpose of limiting recovery to the most deserving malpractice victims.[194] Third, the legislature failed to provide adequate substitute remedies to replace the right to recovery modified by the application of statutory caps.[195] The court concluded that the cap failed to provide even a societal quid pro quo because the cap did not adequately compensate the most severely injured malpractice victims nor did it provide a mechanism to eliminate or to prevent nonmeritorious claims.[196] Thus, the court held that the cap was unconstitutional under the Texas Constitution's "open courts" provision.[197]

b. Jurisdictions Holding that Statutory Caps Do Not Violate the "Open Courts" Provision

In evaluating statutory caps as a violation of the "open courts" provision and the corresponding "right to redress clauses" of state constitutions, courts focused on the quid pro quo argument delineated in *Lucas v. United States*.[198] In *Jones v. State Board of Medicine*,[199] the Supreme Court of Idaho rejected the argument that the right to remedy was inviolate and that the legislature may only amend common law remedies if they provide substitute procedures or alternate remedies.[200] The court reasoned that this argument would prevent alteration of common law rights governing the public health, safety, and welfare without constitutional amendment.[201] The "right to remedy" provision of the constitution did not explicitly prohibit legislative modifications of common law actions.[202] Accordingly, the court found

191. *Id.* A statute or law violates the "open courts" provision if (1) a cognizable common law cause of action is being restricted, (2) the restriction is unreasonable or arbitrary when balanced against the legislation's objective and purpose, and (3) if the legislation modifies a common law cause of action, an adequate substitute must be provided. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* The court stated that "[i]t is impossible for a seriously injured victim of malpractice to obtain any recompense above the statutory maximum for his or her injuries". *Id.*

195. *Id.*

196. *Id.* at 1106-07.

197. *Id.* at 1108.

198. 757 S.W.2d 687 (Tex. 1988). *See generally supra* notes 172-188 and accompanying text.

199. 555 P.2d 399 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977).

200. *Id.* at 404.

201. *Id.*

202. *Id.*

that the legislature could modify the right to remedy without providing a corresponding quid pro quo.[203] Thus the court held that the statutory cap did not violate the "open courts" provision of the state constitution.[204]

Courts also analyzed the right of access in the "open courts" provision within a procedural due process framework.[205] In *Sibley v. Board of Supervisors of Louisiana State University*,[206] the plaintiff argued that the "open courts" provision should be interpreted as requiring an unrestricted remedy.[207] The Supreme Court of Louisiana rejected this argument stating that a legislature may modify access to the judiciary system as long as the measure was not totally arbitrary and was not essential to the exercise of a fundamental constitutional right.[208] The court found that the right to sue for damages caused by medical malpractice was not a fundamental right; and that the cap was subject to the lesser standard of reasonableness.[209] The court concluded that the "limitation of liability on medical malpractice claims is at least reasonably related to the state's attempt to minimize the costs and maintain its medical services to the citizens of Louisiana at low or no costs."[210]

c. Summary of "Open Court" Provisions Arguments

In conclusion, the success of challenges based upon the state "open courts" provision hinges on whether the court accepts or rejects the need for an alternative remedy for the modification of the right to access. Without a reasonable alternate remedy, some courts will prohibit modification or abol-

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203. *Id.*

204. *Id.* at 404-05. For a related view, see Justice Gonzalez's dissent in Lucas v. United States, 757 S.W.2d 687, 693 (Tex. 1988), which rejected the existence of a quid pro quo as a constitutional prerequisite for substantive due process. *Id.* The opinion argued that the quid pro quo element was a factor in determining whether a scheme denies the right of redress unreasonably and is not the sole test. *Id.* at 697. An individual quid pro quo is unnecessary if a societal quid pro quo exists. *Id.* Justice Gonzalez concluded that there was both an individual quid pro quo and a societal quid pro quo. *Id.* The societal quid pro quo was the predictability of the rate structures, resulting in a decrease in the cost of medical malpractice insurance premiums and the increase in the availability of health care. *Id.* The individual quid pro quo was that health care providers can obtain adequate insurance coverage because victims may recover against an insolvent judgment proof health care provider. *Id.* In light of this, the dissenting opinion argued that the cap was constitutional and did not violate the "open courts" provision.

205. Sibley v. Board of Supervisors of La. State Univ., 462 So. 2d 149, 157 (La. 1985).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

ishment of the right of access, guaranteed by the "open courts" provision.[211] Other courts will not require an alternative remedy or quid pro quo because this would deprive the legislature of its power to modify defects in common law doctrines in response to changing circumstances in society.[212] If the court requires a quid pro quo for the legislature's modification of a common law right to access, proponents of the cap should stress the societal and individual quid pro quo. Opponents of the cap should stress that individual plaintiffs do not receive any new remedies for the limitation on their damages. If the court rejects a quid pro quo requirement, proponents of the cap must argue that the cap does not completely abolish the right of access and right of redress, but rather only partially restricts these rights. Most importantly, proponents should stress the need for legislative flexibility to enact measures to promote the public health, safety, and welfare due to changing circumstances. The legislature should have the power to remedy the defects in the common law. Opponents of the cap should stress the unreasonableness of the cap.

The "open courts" provision of state constitutions effectively serves the same functions as the due process clause of the Fourteenth Amendment. Conceptually, the two clauses are similar. Thus, litigants may also utilize successful due process arguments.

2. *"Special Privilege" or "Special Law" Clause*[213]

a. *Jurisdictions Holding that Statutory Caps Violate "Special Law" or "Special Privilege" Clause*

In *Wright v. Central Du Page Hospital Association*,[214] the Supreme Court of Illinois held that the cap was a "special law"[215] which violated the equal

211. Arancibia, *supra* note 1, at 149.

212. *Id.* This limit on the legislature's power would create a judiciary with massive policy making authority. *Id.*

213. The "special privilege" clause prohibits the granting of special privileges or immunities to an individual or a class of individuals. Morris v. Savoy, 576 N.E.2d 765, 782 (Ohio 1991) (Sweeney, J., dissenting). The "special privilege" provision prevents the law from "bestowing favors on preferred groups or localities." Jones v. State Bd. of Medicine, 555 P.2d 399, 416 (Idaho 1976), *cert. denied*, 431 U.S. 914 (1977). A law is general and not a "special law" or "special privilege," if "all persons subject to it are treated alike as to privileges, protection and in every other respect." *Id.* A law is not special if all persons who are subjected to it are treated similarly with respect to privileges and liabilities. *Id.* at 416-17.

214. 347 N.E.2d 736 (Ill. 1976)

215. A "special law" is a law that applies specifically to a class of individuals or is designed for a particular purpose. Board of County Comm'rs v. Swensen, 327 P.2d 361, 362 (Idaho 1958). A "special privilege" is granted to the health care providers as a class. *Wright*, 347 N.E.2d at 743.

protection clause of the state constitution.[216] The societal quid pro quo[217] failed to make the classification reasonable under the rationale of the Illinois Workmen's Compensation Act,[218] which limited the monetary recovery of employees for employment-related injuries.[219] The Workmen's Compensation Act provided a quid pro quo whereby the employer assumes liability without fault and is relieved of the prospect of high damage awards.[220] "[T]he employee, whose monetary reward was limited, was awarded compensation without regard to the employer's negligence."[221] This quid pro quo, however, did not extend to the most seriously injured victims of medical malpractice when statutory caps apply.[222] Statutory caps limited the victims recovery without reducing the burden of proof, abolishing common law defenses, or altering the essential elements of the medical malpractice action.[223] The recovery of damages by the most severely injured was denied on an arbitrary basis when statutory caps were imposed and an unconstitutional special privilege of limited liability was granted to health care providers.[224] Accordingly, the court found the cap an unconstitutional special law which violated the equal protection clause of the state constitution.[225]

b. Jurisdictions Holding that Statutory Caps Do Not Violate the "Special Law" or "Special Privilege" Clause

In *Etheridge v. Medical Center Hospitals*,[226] the plaintiff argued that the cap granted special privileges and immunities to health care providers and their insurers while simultaneously discriminating arbitrarily between the severely injured and the less severely injured.[227] The "special legislation"

216. *Id.* at 743.

217. A few individuals must give up the right to damages in order to achieve cheaper medical care for the public good. *Id.* at 742.

218. ILL. REV. STAT. ch. 48, para. 138.1-138.28 (1975).

219. Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976); *see also* Carson v. Maurer, 424 A.2d 825, 837 (N.H. 1980) (stating that the state Workmen's Compensation Act does not support the finding that the cap, as a limitation on damage recovery, is constitutional and that Workmen's compensation acts provide a quid pro quo for the tort victims whose common law right of full recovery is limited by statutory law).

220. *Wright*, 347 N.E.2d at 742.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 742-43; *see* Grace v. Howlett, 283 N.E.2d 474, 479 (Ill. 1972) (holding that if recovery is permitted or denied on an arbitrary basis, a special privilege is granted in violation of the state constitution).

225. Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976). There was no acceptable quid pro quo for the limitation on an individual's right to full recovery. *Id.*

226. 376 S.E.2d 525 (Va. 1989).

227. *Id.* at 532-33; *see also* Prendergast v. Nelson, 256 N.W.2d 657, 668-69 (Neb. 1977) (holding that the cap, which was a special privilege, was only unconstitutional if wholly irrele-

clause of the Virginia Constitution permits laws to apply to a single class as long as that class is reasonable in relation to the purported legislative goal.[228] The court held that the test was whether the classification, created by the special privilege, bore a reasonable and substantial relation to the object sought to be achieved by the legislation.[229] The Supreme Court of Virginia concluded that the classification applied to all persons within the classification equally and without distinction.[230] All malpractice victims whose damages exceeded the statutory cap were treated equally; their damage awards were reduced. Accordingly, the court held that the cap did not violate the "special legislation" provision.[231]

c. Summary of "Special Privilege" or "Special Law" Arguments

Conceptually, the "special privilege" or "special law" clause of state constitutions is similar to equal protection guarantees of the federal Constitution because the analysis focuses on whether a special privilege is unreasonably granted to a particular class of individuals. Accordingly, litigants may utilize successful equal protection arguments. Proponents of the cap should argue that the cap is reasonably related to the medical malpractice insurance crisis. Opponents of the cap should stress the unreasonableness of granting limited liability to health care providers by regulating the recovery of the most severely injured victims. The constitutionality of the cap will hinge on the judiciary's evaluation of the reasonableness of the legislation in light of all the particular facts and circumstances.

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vant to the achievement of a state's objective; the cap was not unconstitutional because the procedure was elective and the act guaranteed the victim an assured Patient Compensation Fund of $500,000 for the payment of any malpractice claim).

228. *Etheridge*, 376 S.E.2d at 533. More importantly, persons within the class must be treated similarly. *Id.*

229. *Id.*

230. *Id.* For a similar opinion see Justice Gonzalez's dissent in Lucas v. United States, 757 S.W.2d 687, 693 (Tex. 1988), which concluded that damage caps were not special laws because such legislation applied uniformly to all who come within the classification established by the legislation. *Id.* at 700.

231. Etheridge v. Medical Ctr. Hosps., 376 N.E.2d 525, 533 (Va. 1989). For a contrasting view, see the dissent of Justice Russell in *Etheridge*, which concluded that the cap offended the prohibition against special laws in the state constitution. *Id.* at 536. Justice Russell asserted that statutory caps created a class of health care providers with a special privilege: Their liability was limited to the statutory cap. *Id.* All health care providers who did not fall within this class must pay the full amount of a jury verdict. *Id.* Moreover, the statutory cap also created a disfavored class of seriously injured victims whose damages were not fully recoverable. *Id.* Justice Russell asserted that the "special law" provision was aimed at destroying this kind of economic favoritism. *Id.* at 537.

3. *Right to a Jury Trial*[232]

1. *Jurisdictions Holding that Statutory Caps Violate the Right to a Jury Trial*

In *Moore v. Mobile Infirmary Association*,[233] the Supreme Court of Alabama held that the statutory cap imposed an impermissible burden on the right to a jury trial that is guaranteed by the state constitution.[234] The court explained that the jury determination of the amount of damages was the very essence of the fundamental constitutional right to a trial by jury.[235] The court concluded that the determination of damages was within the discretion and judgment of the jury alone.[236] The imposition of a cap effectively bound the jury's discretion.[237] A limitation on the jury's discretion, other than by instruction as to the circumstances whereby damages are to be awarded, violated the constitutional right of trial by jury.[238] Thus, the cap effectively invalidated the jury's function once damages exceeded the cap.[239] The court explained that the jury's function was less than advisory when the cap was automatically and absolutely imposed on the verdict.[240] The court concluded that this infringement on the right to a trial by jury violated the mandates of section 11 of the state constitution.[241]

In *Kansas Malpractice Victims Coalition v. Bell*,[242] the Supreme Court of Kansas analyzed the right to a jury trial under a due process framework.[243] Because due process requires that statutory modifications of the right to a jury trial be "reasonably necessary in the public interest to promote the gen-

232. Statutory caps were also challenged under the right to a jury trial guaranteed by the state constitution. Many state constitutions provide that the right to trial by jury shall remain inviolate. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 159 (Ala. 1991); Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251, 258 (Kan. 1988); Morris v. Savoy, 576 N.E.2d 765, 778 (Ohio 1991); Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 528 (Va. 1989) (holding the right to a trial by jury to be sacred). This right is a valuable and substantial right that should be closely guarded against infringement. *Bell*, 757 P.2d at 258. The traditional role of the jury is the determination of fact which includes the assessment of damages. *Id.*

233. 592 So. 2d 156 (Ala. 1991).

234. *Id.* at 164. Article I, § 11 of the Alabama Constitution provides in pertinent part: "That the right of trial by jury shall remain inviolate." ALA. CONST. art. I, § 11.

235. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 161 (Ala. 1991).

236. *Id.* at 160.

237. *Id.* at 161.

238. *Id.* at 162.

239. *Id.* at 163.

240. *Id.*

241. *Id.* *See supra* note 243.

242. 757 P.2d 251 (Kan. 1988).

243. *Id.* at 259.

eral welfare of the people of the state,"[244] the legislative means must have a real and substantial relation to the purported objective.[245] This due process requirement may be met by providing alternative remedies, i.e., a quid pro quo.[246] The defendant argued that the statutory caps provided a quid pro quo:[247] Lower health care costs when doctors save money on their insurance and pass the savings onto their patients; more doctors practicing medicine resulting in greater availability of health care; and compensation for damages and the diminution of fear of judgment-proof uninsured physician.[248] The court explained that statutory caps simply failed to provide any additional assurance of compensation for the medical malpractice victim.[249] The court determined that the asserted benefits did not outweigh the restriction imposed on the right to a trial by jury.[250] The substitute remedy offered by statutory caps was inadequate for seriously injured victims and that the caps denied them their right to trial by jury.[251]

In *Bell*, the court concluded that the statutory caps effectively acted as a compulsory preestablished remittitur.[252] Through the application of caps, plaintiffs were forced to forego a portion of awarded damages without their consent.[253] With statutory caps, victims were not given the option of a reduced jury verdict or a new trial. Victims were obligated to accept judgment for the reduced jury verdict and the caps arbitrarily limited the factual determination of damages by the jury.[254] The court reasoned that "[n]o verdict is right which more than compensates — and none is right which fails to compensate."[255] Here, the caps were unconstitutional because they failed to compensate the most severely injured. The court concluded that because noneconomic damages were so difficult to calculate with mathematical certainty, the only appropriate standard was the amount a reasonable person estimated to be fair compensation for the injuries sustained.[256] The courts

244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 259-60.
251. *Id.* at 260.
252. *Id.* Damages for personal injury are to be reduced by a remittitur only when damages do not reflect the evidence provided and the plaintiff has the option of accepting the remittitur or asking for a new trial. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* (quoting Domann v. Pence, 325 P.2d 321 (Kan. 1958)).
256. *Id.* at 260.

have entrusted this duty of the reasonable person to the jury.[257] Essentially, the cap undermined the reasonable person standard. For these reasons, the court held that the cap was unconstitutional.

2. *Jurisdictions Holding that Statutory Caps Do Not Violate the Right to a Jury Trial*

In *Etheridge v. Medical Center Hospitals*,[258] the Supreme Court of Virginia concluded that statutory caps did not violate the right to a jury trial because the role of the jury was limited to ascertaining facts and assessing damages.[259] The court reasoned that statutory caps merely established the outer limits of a remedy and that this determination was a matter of law.[260] The application of a cap was also an issue of law not an issue of fact and it was the judiciary's role to apply the law to the facts.[261] The court concluded that the trial court imposed the cap on the assessment of damages only after the jury had fulfilled its fact-finding function.[262] The court explained that while a party had the right to have a jury determine damages, the party did not have the right to have a jury dictate the legal consequences of the damages calculation.[263] A trial court dictates the legal consequences of the remedy. Accordingly, the court held that the cap did not infringe upon the right to a jury trial because the limitation on the remedy was imposed after the jury had completed its fact-finding.[264]

In *Johnson v. Saint Vincent Hospital Inc.*,[265] the plaintiffs argued that the cap violated the right to a jury trial because the cap removed the determination of damages from the jury.[266] The plaintiffs' premise was that the right to trial by jury included the right to have the jury determine all damages.[267] The Supreme Court of Indiana rejected this argument because the cap was applied only after the jury reached its verdict and therefore, the issue of damages was fully adjudicated by the trier of fact.[268] The cap did not destroy the jury's resolution of a justiciable controversy, since the right to have the jury assess damages remained available. Accordingly, the cap did not

257. *Id.*
258. 376 S.E.2d 525 (Va. 1989).
259. *Id.* at 529.
260. *Id.*
261. *Id.*
262. *Id.* The court noted that without question, a jury's fact-finding function includes the assessment of damages. *Id.*
263. *Id.* at 529.
264. *Id.*
265. 404 N.E.2d 585 (Ind. 1980).
266. *Id.* at 601.
267. *Id.*
268. *Id.* at 602.

violate the right to a jury trial because the substance of that right remained protected.[269]

3. *Summary of a Right to a Jury Trial Arguments*

The argument for the right to a jury trial hinges on the interpretation of the scope of the jury's role and the weight afforded the right to a jury trial. In invalidating statutory caps, courts focus on the substance of the right to a jury trial: the jury's determination of the facts including its assessment of damages. Opponents of the cap should emphasize the substance of the right to trial by jury. They should assert that the arbitrary and absolute imposition of a cap effectively undercuts the substance of the right to a trial by jury. The substance of the right is preserved if the valuation of damages is less than the cap. The jury's assessment of damages over the cap, however, is essentially meaningless.

In upholding statutory caps, courts focus on the form of the right to a jury trial. The imposition of the cap does not infringe upon the jury's function as trier of fact because the cap is applied only after the jury has reached its verdict and calculated damages. Courts also draw a distinction between the assessment of damages by the jury and the legal consequence of a remedy. The actual factual determination of damages is within the province of the jury; the issue of damages as a remedy is a legal issue within the province of the court. The right to a jury trial is preserved if the jury is permitted to assess damages. Proponents of the cap should stress that the cap is applied only after the jury has decided the case on its individual merits and assessed damages. Thus, the jury has completed its fact-finding function.

4. *Separation of Powers*[270]

In *Etheridge v. Medical Center Hospitals*,[271] the plaintiff argued that the cap interfered with the powers of the court to enforce judgments, and consequently, the cap circumscribed the discretion of the judiciary.[272] The plaintiff contended that the courts actually became ministerial agents of the legislature.[273] The Supreme Court of Virginia rejected this argument and stated that the legislature had the power to provide, to modify, or to repeal a

269. *Id.*

270. The separation of powers doctrine requires that the legislature, the executive branch, and the judiciary exercise separate and distinct powers and forbids one branch from employing powers belonging to one of the others. Etheridge v. Medical Ctr. Hosps., 376 S.E.2d 525, 532 (Va. 1989).

271. 376 S.E.2d 525 (Va. 1989).

272. *Id.* at 532.

273. *Id.*

remedy.[274] The enactment of a limitation on a common law right of recovery was clearly within the legislature's power.[275] Thus, the court held that the statutory cap was a modification of the common law.[276] More importantly, if the court entered an award in excess of the cap, the court would be violating the doctrine of separation of powers by invading the province of the legislature that had enacted the statutory cap.[277] Accordingly, the court held that statutory caps did not violate the doctrine of separation of powers and were constitutional.

III. THE HEALTH CARE LIABILITY REFORM AND QUALITY OF CARE IMPROVEMENT ACT OF 1992

On July 2, 1992, President Bush submitted the Health Care Liability Reform and Quality of Care Improvement Act of 1992 ("the Health Care Bill") to Congress for enactment.[278] The stated purpose of the bill was to stem the cost of health care caused by medical malpractice.[279] President Bush noted the need for such an act because "the access to quality care for significant portions of the population has been threatened."[280] The Health Care Bill sets forth the following significant findings: (1) The rising costs of malpractice insurance, litigation, and liability are escalating the cost of health care; (2) the malpractice crisis is creating tensions between the medical and legal professions as well as between the insurance industry and consumers; and (3) doctors are practicing unnecessary defensive medicine and cancelling high-risk procedures and specialties due to fear of malpractice suits.[281] The Health Care Bill suggests that health care reforms would reduce the incidence of medical malpractice and would improve the effectiveness of the civil system.[282] In turn, frivolous claims of health care malpractice would decrease and meritorious claims would be more fairly compensated.[283]

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274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. H.R. DOC. NO. 84, 102d Cong., 1st Sess. (1991). *See supra* note 13. With the election of Bill Clinton as President in November 1992, the status of this bill is unknown. Yet, it should be considered by First Lady Hillary Rodman Clinton in her health care reform package.
279. *Id.*; *see also* 138 CONG. REC. H5976-07 (daily ed., July 2, 1992); 138 CONG. REC. S9772-02 (daily ed., July 2, 1992)(Message from President Bush to Senate and the House of Representatives).
280. 138 CONG. REC. H5976-07 (daily ed. July 2, 1992); 138 CONG. REC. S9772-02 (daily ed. July 2, 1992) (Message from President Bush to Senate and the House of Representatives).
281. H.R. 3037, 102d Cong., 1st Sess. §§ 101(b)-101(d) (1991).
282. *Id.* §§ 101(d)-101(e).
283. *Id.* § 101(f).

Title II of the Health Care Bill outlines health care liability reforms.[284] Section 204 places a limitation on noneconomic damages.[285] The limit of $250,000 is applied to any and all health care actions.[286] The cap is imposed against all plaintiffs and defendants whose cause of action arises out of, or is caused by, the same personal injury or death.[287] The most significant provision is that the Secretary of Health and Human Services, for good cause, may waive the statutory cap requirement.[288] The waiver authority is limited and is intended to be used sparingly.[289] The invalidation of the caps as a violation of a state constitution provision by a state supreme court may constitute "good cause."[290]

The Health Care bill, and in particular its caps on noneconomic damages, has been criticized: "[I]t's a plan to protect malpractice insurers. It will have little, if any, effect on health care costs."[291] Caps have been further criticized as a stale approach to the crisis because their constitutionality has already been questioned and rejected at the state level.[292] Moreover, little evidence exists that shows that statutory caps will lower insurance rates.[293] Critics argue that rates are more accurately and closely tied to the insurance

284. H.R. 3037, 102d Cong., 1st Sess. §§ 201-210 (1991). Section 201 contains definitions. Section 203 abolishes joint and several liability. Section 205 requires the reduction of damage awards by collateral source compensation, by abolishing the traditional collateral source rule, except as provided in this section. Section 206 establishes a periodic payment plan for damage awards. Section 207 encourages the establishment of alternative dispute resolution. Section 208 provides quality assurance reforms by improving state cooperations with federal effectiveness research efforts, improving the performance of state medical boards, and establishing alterative programs. Section 209 outlines the implementation procedure. States that do not comply with the bill within three years would not receive their full Medicare and Medicaid funding increases. The withheld money would go into a pool of incentive payments for complying states. 137 CONG. REC. E2717 (daily ed. July 25, 1991) (statement of Rep. Bill Archer). Section 210 permits the Secretary of Health and Human Services in conjunction with the Attorney General to waive the requirements of Title II if the state has already enacted an experimental project or promulgation. *Id.* Title III outlines similar reforms to be implemented under the Federal Tort Claims Act. H.R. 3037, 102d Cong., 1st Sess. §§ 301-303 (1991).

285. H.R. 3037, 102d Cong., 1st Sess. § 204 (1991). Noneconomic damages are defined in section 201(b) as "losses for physical and emotional pain, suffering, physical impairment, emotional distress, mental anguish, disfigurement, loss of enjoyment, and loss of companionship, services, consortium and other non-pecuniary losses incurred by the individual as a result of negligence in the provisions of health care services as recognized by State law." *Id.* § 201 (b).

286. The limit will be indexed every three years to reflect changes in the cost of living. H.R. 3037, 102d Cong., 1st Sess. § 204(c) (1991).

287. *Id.* § 204 (a)-(b).

288. *Id.* § 204(a).

289. 137 CONG. REC. E2716 (daily ed. July 25, 1991) (statement of Rep. Bill Archer).

290. *Id.*

291. *Bush's Insurance-Cap Plan a Proven Failure*, SEATTLE TIMES, May 16, 1991, at A12.

292. *Id.*

293. *Id.*

industry's investment income performance rather than to actual pay-out risks.[294] Washington's Insurance Commissioner, Dick Marquardt, concluded that the procedures of rate review and the reporting of investment income would stabilize the insurance market more effectively than tort reforms.[295] "Bush's proposal is five years late and a proven failure to boot."[296]

Lawyers and legal commentators criticize the caps because they are "unfair and unnecessary and tend to punish the most severely injured people whose quality of life is destroyed by negligence."[297] Legal commentators assert that "[i]t is a totally regressive form of tort reform."[298] Additionally, these kinds of proposed legislative changes have had mixed success on the state level: Caps have produced an insignificant impact on insurance premiums.[299] States with caps continue to experience smaller increases in their malpractice premiums.[300]

Consumer groups such as the National Insurance Consumer Organization argue that the inherent privilege granted health care providers in comparison to other tortfeasors is unfair.[301] They suggest that the problem lies with the doctors who should bear the burden of reform instead of the victims whose rights are taken away.[302]

Critics suggest that the recent decline in the medical malpractice insurance crisis is misleading because the medical malpractice crisis is a ten year boom and bust cycle.[303] Critics suggest that a new wave of litigation in medical malpractice is possible as a result of the present financial troubles of the insurance industry and the slight increase in the frequency of claims in 1990.[304]

The Health Care Liability Reform and Quality of Care Improvement Act of 1992 reaches a delicate balance between the need for tort reform and the protection of the injured individual's right to adequate compensation. The Health Care Bill combines a variety of tort reforms that are aimed at resolving the legal issue of damages. It limits high and erratic jury damage awards

294. *Id.*
295. *Id.*
296. *Id.*
297. Glazer, *supra* note 46, Health Section, at 11.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 12.
302. *Id.*
303. *Id.*
304. *Id.*; *see also* Walter Wadlington, *Medical Injury Compensation A Time for Testing New Approaches*, 265 JAMA 2861 (1991) (noting that the improved liability insurance climate is transient and a renewed sense of crisis during this decade is forthcoming).

through the statutory cap of $250,000 on noneconomic damages;[305] it abolishes both joint and several liability,[306] and the traditional collateral source rule[307] in the hope of reducing the excessive payment of damage awards by insurance companies. The Health Care Bill eases the burden of damage payments by establishing a periodic payment plan instead of a lump-sum approach.[308] The bill also encourages the utilization of alternative dispute resolution mechanisms.[309]

Unlike state tort reform legislation, the bill permits the Secretary of Health and Human Services to waive the imposition of the cap for good cause shown. This provision highlights the inequity that may result when the cap is imposed on the most severely injured victims of malpractice. This "good cause" waiver permit individual states to determine whether or not the cap will be imposed. If the state supreme court determines that the cap is unconstitutional, the good cause requirement has been met and the cap is not applicable. The Health Care Bill ultimately permits each state to determine whether the statutory cap is a reasonable means of providing adequate health care at a reasonable cost. This provision of the act is the compromise between the need to adequately compensate the injured and the need to limit the liability of health care providers in an effort to ensure adequate health care at an affordable cost.

The Health Care Liability Reform and Quality of Care Improvement Act of 1992 aimes to ease the medical malpractice insurance crisis. It contains the proper level of tort reforms by balancing the need for limited liability on health care providers without ignoring the inherent burden and inequity that arises when statutory caps are imposed on the most severely injured. The Health Care Bill, however, fails to address the problems within the medical profession and insurance industry that contribute to the malpractice insurance crisis. The Health Care Bill does not regulate the insurance rate structure nor does it provide a mechanism to eliminate or reduce frivolous claims. In order to ultimately resolve the medical malpractice crisis, the burden of attaining affordable health care for the public must not lie on the most severely injured victims of medical malpractice. The medical malpractice crisis is not a single problem created by the legal community. It is a series of problems spanning the legal and medical profession as well as the insurance industry. The medical profession and the insurance industry now must take the initiative to resolve the medical malpractice crisis.

305. H.R. 3037, 102d Cong., 1st Sess. § 204 (1991).
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*

IV. CONCLUSION

In response to the medical malpractice insurance crisis, twenty-seven states enacted tort reform legislation including caps on damage recoveries. Lawyers responded by challenging the constitutionality of statutory caps on a variety of grounds. To date, ten states have invalidated statutory caps as unconstitutional at either the federal or state level.

In response to an intensive lobbying effort, a federal tort reform package entitled the Health Care Liability Reform and Quality of Care Improvement Act of 1992 was introduced in July 1992. The Health Care Bill aimes to cure the malpractice insurance crisis. It attempts to balance the need of limiting liability on health care providers without ignoring the tremendous burden and inequity placed on the most severely injured victims of malpractice. The Health Care Bill contains a cap on liability with a waiver provision, thereby addressing the argument that the absolute and arbitrary effect of a cap results in inherent inequities and that the element of discretion has been eliminated. By including a waiver provision, the Health Care Bill attempts to reduce the inequity by providing a discretionary element in the imposition of the cap. The Health Care Liability Reform and Quality of Care Improvement Act of 1992 attempts to attain that delicate balance between the protection of our health care profession through limited liability and the protection of the right of the most severely injured victims to adequate compensation.

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